Supreme Court, U.S.
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93-209
NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

WILLIAM C. BLANKSTYN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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32 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Petitioner was entitled to injunctive relief under Internal Revenue Code (IRC), §§6213(a) and 7421 after a Notice of Deficiency was issued under IRC, §6212(a) and was properly deposited in the United States Mail by the Internal Revenue Service (IRS), but was mishandled by the United States Postal Service resulting in the Petitioner's non-receipt of the Notice?

2. Whether Rule 65(a)(2), Federal Rules of Civil Procedure (FRCP), requires the district Court to give notice to the parties before it advances the trial on the merits and consolidates it with the hearing on preliminary injunction?

THE PARTIES

The only parties are those who appear in the caption of the case.

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OCTOBER TERM, 1992

WILLIAM C. BLANKSTYN

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, William C. Blankstyn, hereby Petitions this Court for its Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on February 22, 1993.

OPINION OF THE COURT BELOW

Both the opinion of the Ninth Circuit Court of Appeals and the United States District Court in Arizona were unpublished opinions and are included in the separate Appendix filed with this petition.

JURISDICTION

On February 22, 1993, the Court of Appeals for the Ninth Circuit entered its judgment (Appendix A) affirming in part and reversing in part the judgment of the United States District Court for the District of Arizona (Appendix C).

On March 5, 1993, the Petitioner filed a Petition for Rehearing within the time permitted by Rule 40(a), Federal Rules of Appellate Procedure (FRAP).[1] The Court

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1/ **Rule 40. Petition for Rehearing.**
(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. (in part)

denied the Petition on May 12, 1993. The jurisdiction of this Court to review the judgment of the Court of Appeals by writ of certiorari is invoked under the provisions of 28 USC, §1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutes, regulations and rules involved, are IRC, §§6212(a), 6213 and 7421(a) and Rule 65(a)(2), FRCP, and are stated below.

Sec. 6212. Notice of Deficiency.

(a) In general.

If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitle A or B or chapter 41, 42, 43 or 44, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

Sec. 6213. Restrictions applicable to deficiencies; petition to Tax Court

(a) Time for filing petition and restriction on assessment

"Within 90 days...after a Notice of Deficiency authorized under Section 6212 is mailed...the taxpayer may file a petition with the United States Tax Court for a redetermination of the deficiency.

Except as otherwise provided in Section 6851 or 6861, no assessment of a deficiency in respect of any tax..., and no levy or proceeding in Court for its collection shall be made, until such notice has been mailed,... nor until the expiration of the 90-day... period... Notwithstanding the provision of Section 7421(a), the making of an assessment or the beginning of such proceedings or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court including the Tax Court." (in part)

Sec. 7421. Prohibition of suit to restrain assessment or collection.

(a) Tax.

Except as provided in sections 6212(a) (c), 6213(a), 6672(b), 6694(c), and 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

Rule 65. Injunctions.

(a) Preliminary Injunction.

(2) Consolidation of Hearing With Trial on Merits. Before or after the commencement of the hearing of an application for a

> preliminary injunction, the court may order the trial on the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be construed and applied as to save to the parties any rights they may have to trial by jury.

STATEMENT OF THE CASE AND FACTS

On or about January 2, 1990, the Petitioner received two (2) Notices of Proposed Adjustment (30-day letter) which made proposed adjustments in income taxes due for the years 1985 and 1986. On or about April 20, 1990, the Petitioner received what purported to be a Notice of Deficiency, issued by the Director of the Ogden Service Center in the name of the Commissioner of Internal Revenue Service, dated March 26, 1990. The Notice was only for the year 1986. The Petitioner timely

filed a Petition to the United States Tax Court with respect to the 1986 Notice of Deficiency. The Petitioner did not receive the Notice of Deficiency for the year 1985.

On March 23, 1990, the Petitioner wrote to one Marc Garcia[2] and asked him if the Notice of Deficiency for the year 1985 was going to issue and if the Notice had issued why hadn't the Petitioner received it. The Petitioner received no response to this letter. On December 23, 1990, the Petitioner, via a request under the Freedom of Information Act (FOIA), requested a copy of his Examination Administration File and other documents for the year 1985.

On or about January 7, 1991, the Petitioner received a Final Notice and Demand (Notice of Intent to Levy) from the Ogden Service Center for taxes that were

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2/ Marc Garcia was identified as the person to contact with respect to both 30-day letters and the 1986 Notice of Deficiency.

alleged to have been assessed for the year 1985. On or about January 10, 1991, the Petitioner wrote to Mr. Robert Wenzel, Director, Ogden Service Center and informed him that the Petitioner had not received the Notice of Deficiency for the year 1985.

On January 23, 1991, the Petitioner received a partial response to his FOIA request. The disclosure officer denied the request for the Examination Administration File because 1985 was involved in a law enforcement proceeding in the United States Tax Court. The Petitioner appealed the denial of the records on February 26, 1991.

On or about February 14, 1991 a Notice of Levy on Wages Salary and other income [Form 668-W(C)] was sent from the Automated Collection Branch of the Internal Revenue Service in Denver, Colorado to KPNX Broadcasting Company. KPNX did not inform the Petitioner of the Notice of Levy until

March 5, 1991 as the Notice had been sent to the wrong address.

On March 13, 1991, the Petitioner telephoned Automated Collection in Denver. He discussed the matter with a Mrs. Sexton. She suggested that the Petitioner go to the local Phoenix District Office and discuss the problem with someone there. On March 15, 1991, the Petitioner went to the Phoenix Office and talked with a Mel Stewart. He showed Mr. Stewart the correspondence, the FOIA and the response to the request.

Mr. Stewart contacted Ogden and told the Petitioner that the Notice of Deficiency had issued and that it was in the "Audit File." Mr. Stewart told the Petitioner, that because he had allegedly failed to file his returns for 1989 and 1990, that neither he nor the Collections Department would take any action to remove the Notice of Levy that had been served upon KPNX.

On March 18, 1991, the Petitioner discussed the matter with Mark Ashby, Assistant United States Attorney, District of Arizona. Mr. Ashby suggested that the Petitioner discuss the matter with the Assistant District Counsel that was handling the Petition to the United States Tax Court for the 1986 Notice of Deficiency.

On March 19 and 20, 1991, the Petitioner called and talked with Mr. Andrew J. Horning in the district Counsel's Office. He told the Petitioner to bring copies of all of the documents and he would see what he could do. On March 21, 1991, the Petitioner took the documents to Mr. Horning under a cover letter which outlined the matter for him. The letter also informed him that if he would not have the IRS voluntarily restrain themselves from Levying upon the Petitioner's property, by 9:00 AM, March 22, 1991, an action seeking a permanent injunction would be filed

accompanied by an application for a temporary restraining order.

On March 22, 1991, the Petitioner again called Assistant United States Attorney, Mark Ashby. He was referred to Assistant United States Attorney Janet Patterson as Mr. Ashby was out of town. The Petitioner told Ms. Patterson that district Counsel would not have the IRS voluntarily restrain themselves. The Petitioner also gave her verbal notice that he would seek a Temporary Restraining Order without further Notice to the United States Attorney's Office.

Later that same day, the Petitioner again called Mr. Horning. Mr. Horning told the Petitioner that the envelope, with the 1985 Notice of Deficiency still in it, had been found. The envelope was unopened and had been returned by the Postal Service marked "unclaimed." Mr. Horning told the Petitioner that his problem was with the Postal Service and not the IRS.

On March 25, 1991, the Petitioner filed his complaint in the United States District Court for the District of Arizona seeking a temporary restraining order, a preliminary injunction and a permanent injunction to enjoin the Respondent from levying on the Petitioner's property to collect taxes alleged to have been assessed for 1985. The Petitioner also sought damages for the unauthorized disclosure of return and return information, in violation of IRC, §7431. [3]

The Petitioner invoked the jurisdiction of the district Court pursuant to the provisions of 28 USC, §§1331, 1340 and 1346 and IRC, §§6213(a) and 7431.

On March 26, 1991, the district Court denied the Petitioner's application for the Temporary Restraining Order, and set a hearing on the Petitioner's Motion for a

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3/ The unauthorized disclosure claims a not a part of this petition as the Court of Appeals reversed the district Court's dismissal of those claims and remanded back for further proceedings.

Preliminary Injunction. On April 19, 1991, the hearing was held.

At the hearing, the testimony of the Respondent's witnesses and the evidence showed that the Notice of Deficiency for the year 1985 had been mailed but was returned to the IRS by the Postal Service marked "unclaimed." The Petitioner's uncontroverted testimony (See Appendix E), showed that even though he had received the Notice of Deficiency for the year 1986, the Postal Records showed that the Notice for 1986 had been returned "unclaimed."

After the hearing the district Court granted the Petitioner's Motion for the preliminary injunction. The Court further ordered the Parties to submit supplemental memoranda on whether the Petitioner could have filed a petition to Tax Court, without actual knowledge of the existence of or the possession of the 1985 Notice, in light of his receipt of the 1986 Notice, where delay

in the delivery of the 1985 Notice was not the fault of the Petitioner.

On April 22, 1991, the Parties submitted their supplemental memoranda. On April 30, 1991, the Court entered its final judgment, vacated the preliminary injunction and dismissed the action. In its Order, the Court stated that it was advancing the trial on the merits and consolidating it with the hearing on the preliminary injunction under the provisions of Rule 65(a)(2), FRCP. No previous notice had been given.

On May 14, 1991, the Petitioner filed a Motion for a New Trial or in the Alternative a Motion to Alter or Amend the Judgment. On July 24, 1991, the Court denied the Motion.

On September 18, 1991, the Petitioner filed his Notice of Appeal. On February 22, 1993, the Court of Appeals rendered its judgment affirming the district Court's dismissal of the injunction claims and reversing the district Court's dismissal of

the unauthorized disclosure claims and remanded the action for further proceedings.

ARGUMENT

I. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT WITH RESPECT TO THE DENIAL OF THE PERMANENT INJUNCTION IS IN CONFLICT WITH THE DECISIONS OF SEVERAL OTHER UNITED STATES COURTS OF APPEAL AND IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT

The Appellate Court found that the Petitioner was not entitled to injunctive relief under the provisions of IRC, §6213(a) because the evidence showed that Internal Revenue Service properly mailed the Notice of Deficiency. The Appellate Court's decision failed to consider the Petitioner's uncontroverted testimony that tended to indicate that the Petitioner's non-receipt of the Notice was caused by circumstances beyond the control of the Petitioner.

The testimony tended to show that it was the Postal Service that mishandled the 1985 Notice, resulting in Petitioner's non-

receipt. The testimony showed that even though he did receive the Notice of Deficiency for 1986, which had been mailed on the same date[4] as the 1985 Notice, Postal Service records showed that the 1986 Notice had also been returned "unclaimed", the same condition the Postal Service claimed in the return of the 1985 Notice.

In failing to consider this uncontroverted testimony the Appellate Court ignored decisions from other circuits that had held that "[w]hen evidence indicates that a notice of deficiency has not been received by the taxpayers due to error of the Postal Service the notice shall be found to be insufficient. POWELL v. C.I.R., 958 F.2d 53, 58 (4th Cir., 1992); McPARTLIN v. UNITED STATES, 653 F.2d 1185, 1191 (7th Cir., (1981). See also KEADO v. UNITED STATES, 853 F.2d 1209, 1212 n.9 (5th Cir., 1984) (Claim of non-receipt of Notice of

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4/ March 26, 1990.

Deficiency by Keado's may have been considered had they filed a Petition to Tax Court within 90 days after becoming aware of the Notice of Deficiency).

Even the Tax Court has found that notice is insufficient when evidence shows that non-receipt of the Notice was the result of Postal Service error. PYO v. COMMISSIONER, 83 TC 626, 639 (1984); MULVANIA v. COMMISSIONER, 81 TC 65, 70 (1983) ["If mailing ***does not*** result in **actual** notice of a tax deficiency, because 'the notice is sent to the wrong address and never delivered, ***or delivered with prejudicial delay***, **the statutory purpose is not served** and it would be **manifestly unfair** to deny the taxpayer his prepayment hearing.'" (emphasis added)]. The Petitioner submits that his uncontroverted testimony shows that the non-receipt of the Notice was caused by the Postal Service and that the 90-day period to Petition the

United States Tax Court did not begin, if it were to begin to run at all until he actually received the notice.[5]

At no time did the district Court or the appellate Court address the Petitioners' uncontroverted testimony or otherwise attempt to distinguish the above cited authorities from the circumstances of this case. The appellate Court refused to acknowledge that the Petitioner's non-

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5/ The Petitioner first received the Notice of Deficiency for 1985 on April 13, 1991. It was attached as an exhibit in the United States' response to the Motion for Preliminary Injunction filed by the Petitioner in the district Court. The Petitioner filed a Petition with the United States Tax Court on July 10, 1991. It was dismissed on January 31, 1992. The Petitioner subsequently appealed to the Ninth Circuit Court of Appeals which affirmed the dismissal on March 19, 1993. The Petition for Rehearing was denied on June 4, 1993. Petition for a Writ of Certiorari in that action must be filed with this Court no later than September 2, 1993. Once it is filed and both this and the other Petition are docketed, the Petitioner will move this Court to consolidate them.

receipt of the Notice of Deficiency was beyond the control of the Petitioner.

In POWELL, supra, the Commissioner Petitioned this Court for a Writ of Certiorari. Despite the Commissioner's ***dire warning*** that the Fourth Circuit's ruling would "seriously impede the ability of the United States to collect taxes from the vast numbers of taxpayers who change their places of residence..." this Court denied certiorari to the Commissioner on November 2, 1992. See COMMISSIONER OF INTERNAL REVENUE v. POWELL, 121 L.Ed.2d 359, 113 S.Ct. 440 (1992). As a result of the Ninth Circuit's judgment in this case it has placed itself in conflict with POWELL, and McPARTLIN, supra, and the Tax Court.

Accordingly, and for the foregoing reasons, this Court should grant the Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals.

II. THE FAILURE OF THE DISTRICT COURT TO GIVE NOTICE TO THE PARTIES BEFORE IT ADVANCED THE TRIAL ON THE MERITS AND CONSOLIDATED IT WITH THE HEARING ON THE PRELIMINARY INJUNCTION, UNDER THE PROVISIONS OF RULE 65(a)(2), FRCP IS IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT

The Court of Appeals declined to decide this issue because of its disposition of the case. (See Appendix A, Footnote 2). In its April 30, 1991 Order (See Appendix C), the district Court indicated for the first time that it was going to advance the trial on the merits and consolidate it with the hearing on the preliminary injunction. The Court gave neither oral nor written notice to the parties before it advanced and consolidated.

The Petitioner raised the issue of lack of notice in his Motion for New Trial or in the Alternative Motion to Alter or Amend Judgment. It was this Motion that the Court of Appeals declined to decide, thus, avoiding altogether the issue of the

district Court's failure to give Notice before it advanced and consolidated.[6]

The Appellate Court's refusal to address the district Court's lack of notice, before it advanced and consolidated, left the Court in conflict with this Court in UNIVERSITY OF TEXAS v. CAMENISCH, 451 US 390, 395, 68 L.Ed.2d 175, 101 S.Ct. 1830

6/ Despite the fact that the Appellate Court declined to discuss the Motion for New Trial, in coming to it's conclusions concerning the unauthorized disclosure claims, the Appellate Court found that the 23C (Summary Record of Assessment) by itself was insufficient to prove the validity of the assessment. The presentation of the 23C as evidence and the need for further discovery was raised in the Motion for a New Trial. Although the issues were fully briefed in Arguments III and IV of in the Appeals Brief, the source of the evidence and issues arose from the Rule 59(e), FRCP, Motion filed in the district Court. The Petitioner submits that Appellate Court should have consider the merits of the 59(e) Motion, once it began using evidence presented with it. By refusing to address the 59(e) Motion the Appellate Court avoided the Motion's full ramifications concerning the district Court's advancement and consolidation without notice.

(1981). The Ninth Circuit's decision was likewise in conflict with other Appellate Court's wherein the lack of notice raised serious questions of constitutional due process. GELLMAN v. STATE OF MARYLAND, 538 F.2d 603 (4th Cir., 1975); PENN v. SAN JUAN HOSPITAL, 528 F.2d 1181 (10th Cir., 1975).

Furthermore, the Ninth Circuit's decision in this case left it in conflict with itself in AIR LINE PILOTS' ASS'N, INTERN. v. ALASKA AIRLINES, INC., 898 F.2d 1393, 1397 (9th Cir., 1989) holding that this Court's opinion in CAMENISCH, was controlling for the notice requirement.[7] In AIR LINE PILOTS', the lack of Notice, before

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7/ It is important to note that there was no dispute from the Parties that the district Court had the discretion to advance and consolidate. The dispute arose concerning the Court's requirement to give notice before it exercised the discretion to advance and consolidate. The district Court's refusal to give notice and the Appellate Court's refusal to decide the issue is in conflict with the decisions of this Court.

advancement and consolidation, was at issue and was part of the basis for the Ninth Circuit's remand back to the district Court. The Respondent refused to show how AIR LINE PILOTS' was distinguishable from this case in both district Court of the Appellate Court. The district Court likewise declined to distinguish the case in its order denying the Motion for New Trial (Appendix D). The Appellate Court simply refused to render any opinion at all on the issue as raised.

The purpose of the notice is to afford all parties of the opportunity to present all of the evidence before the Court rules on the merits, which includes affording the Parties an opportunity to engage in discovery in aid of the presentation of evidence. ABRAHAM ZION CORP. v. LEBOW, 761 F.2d 93, 101 (2nd Cir., 1985); AIR LINE PILOTS', supra, at 1397-98.

If this Court is unable to reach a conclusion for the issue raised in ***Argument***

I because the record does not reflect sufficient testimony and evidence to show that it was Postal Service error in the delivery of the 1985 Notice of Deficiency this Court should return this action to the lower Courts due to lack of Notice before the district Court advanced and consolidated. The Notice that should have been given by the district Court, would have provided the Petitioner the opportunity to inform the Court that he needed more time for discovery to marshall the necessary evidence to support Argument I above.

Accordingly, and for the foregoing reasons, this Court should grant the Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals.

CONCLUSION

As a result of Postal Service error the Petitioner did not receive the Notice of Deficiency for the year 1985. The Notice was returned to the IRS, by the Postal

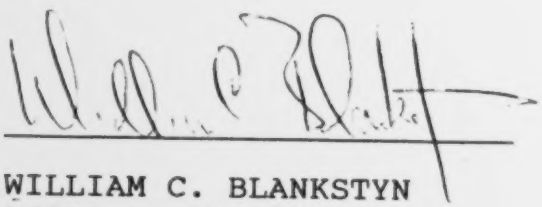
Service, marked "unclaimed." The evidence showed that despite the fact that the Petitioner received the 1986 Notice of Deficiency, which was mailed the same day as the 1985 Notice of Deficiency, the Postal Records for the 1986 Notice of Deficiency also showed that it had been sent back to the IRS "unclaimed."

The Petitioner brought an action for injunctive relief because he did not receive the 1985 Notice. The district Court granted the Petitioner's Motion for Preliminary Injunction. When it subsequently dismissed the action, the district Court advanced the trial on the merits and consolidated it with the hearing on the preliminary injunction, without notice to the parties. The Court of Appeals refused to even address the issue of Notice on appeal due to its disposition of the injunction claims. The Notice would have afforded the Petitioner the opportunity to inform the Court that further discovery

was necessary, should it be found that the record is insufficient to show that the Postal Service erred in mailing the Notice of Deficiency.

Accordingly, and for the foregoing reasons, this Court should grant the Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals.

RESPECTFULLY SUBMITTED this 5th day of August, 1993.



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